**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| Paul Johnson, Jr., | § | |
| *Petitioner*, | § | |
| | § | |
| vs. | § | Civil Action H-06-3896 |
| | § | |
| Nathaniel Quarterman, | § | |
| Director of the Texas Department | § | |
| of Criminal Justice - Correctional | § | |
| Institutions Division, | § | |
| *Respondent*. | § | |

## MEMORANDUM AND RECOMMENDATION

Petitioner Paul Johnson's application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for report and recommendation. (Dkt. 6). Respondent has filed a motion for summary judgment. (Dkt. 15). The court recommends that respondent's motion be granted and Johnson's application denied.

## BACKGROUND

Johnson is in TDCJ custody pursuant to a judgment and sentence of the 263rd District Court, Harris County, Texas (cause number 930226). The jury found Johnson guilty of unlawfully entering a habitation with intent to commit theft and assessed punishment, enhanced by two prior convictions (cause nos. 405022 and 586560), at 55 years imprisonment on May 5, 2003. The Fourteenth Court of Appeals affirmed Johnson's conviction on April 15, 2004. Johnson's petition for discretionary review was refused on November 17, 2004. Johnson subsequently filed an application for writ of habeas corpus, but it was dismissed on January 26, 2005 due to the pendancy of his direct appeal. Johnson

filed a second state writ petition, but it was denied without written order on March 1, 2006. Johnson filed this federal writ petition on July 12, 2006, asserting the same grounds for relief as in his state applications.

## ANALYSIS

### 1. Standard of Review

Johnson's federal petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") 28 U.S.C. § 2254. Section 2254 sets a "highly deferential standard" for evaluating state court rulings which demands that state court decisions be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Johnson may not obtain federal habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

Johnson's petition raises four grounds for relief: (1) his sentence was illegal because his prior conviction (cause no. 405022) was improperly enhanced by an extraneous offense (cause no. 139334); (2) his indictment was invalid or defective because his prior conviction (cause no. 405022) was time barred; (3) his indictment was defective because his prior convictions (cause nos. 405022 and 586560) were too remote to be used for enhancement

purposes in his primary conviction; and (4) he was denied effective assistance of counsel.

**2. Johnson's prior convictions**

Johnson's first three grounds for relief relate to the indictment and the use of his prior convictions for enhancement purposes. Johnson raised these claims in his state writ petition, but the state court denied relief adopting the finding that Johnson failed to timely object to his indictment and was thus procedurally barred from raising an objection on appeal or in any other post conviction proceeding. *Ex parte Johnson*, No. 61,057-02 at 7-8, 23. Under Texas law, if a criminal defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merit commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post conviction proceeding. *See* Tex. Code Crim. Proc. Ann. art. 1.14(b) (Vernon Supp. 2005); *see also Ex parte Patterson*, 969 S.W.2d 16, 19 (Tex. Crim. App. 1998).

Johnson raises claims which rely solely on state law interpretation. However, a state inmate seeking federal habeas review of his conviction must assert a violation of a federal constitutional right. *Narvaiz v. Johnson*, 134 F.3d 688, 695 (5th Cir. 1998). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Nobles v. Johnson*, 127 F.3d 409, 422 (5th Cir.1997). It is not the federal court's function to review the state's interpretation of its own laws. *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995). The state court's determination

of Johnson's illegal sentence and defective indictment claims are not in conflict with established federal law, nor an unreasonable determination of the facts in evidence. Therefore, because no federal constitutional issue is presented, Johnson is not entitled to habeas relief on his first three grounds for relief.

**3. Ineffective assistance of counsel**

Johnson complains that his trial attorney was ineffective for: (1) failing to object to counts of the indictment[1] which were barred by the statute of limitations and (2) abandoning Johnson at a critical stage. To sustain a claim of ineffective assistance of counsel, a habeas petitioner must prove (a) "counsel's performance was deficient" and (b) "the deficient performance prejudiced the defense" so gravely as to "deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 688, 687 (1984). A failure to establish either prong of this test requires a finding that counsel's performance was constitutionally effective. *Id.* at 696. Judicial scrutiny of counsel's performance must be highly deferential, and effort must be made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Pitts v. Anderson*, 122 F.3d 275, 279 (5th Cir. 1997). Furthermore, to establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

[1] Johnson does not specify which counts of the indictment were barred by the statute of limitations. Therefore, the court construes Johnson's claim to refer to his previous conviction no. 405022, as he alleges this conviction was time barred in his second ground for relief.

have been different. *Strickland* 466 U.S. at 694.

Johnson's claim that his attorney was ineffective for failing to object to a time barred previous conviction is without merit. Previous convictions, however remote, can be used for enhancement purposes. *Hicks v. State*, 545 S.W.2d 805, 810 (Tex.Crim.App. 1977); *see also* Tex. Penal Code Ann. § 12.42(d) (Vernon 2005) (if a defendant is charged with a felony offense that is not a state jail felony offense punishable under Section 12.35(a), and the defendant has been previously convicted of two felonies, the most recent offense occurring subsequent to the earliest conviction becoming final, the defendant may be punished with twenty-five to ninety years imprisonment). Objecting to a "time-barred" conviction, therefore, would be meritless, and the failure to raise meritless objections is not ineffective lawyering. *United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995).

Johnson has also failed to present any evidence that his trial counsel abandoned him at a critical stage. The Supreme Court has recognized that "a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984). Moreover, when a defendant has been constructively denied counsel, the courts presume that he or she has been prejudiced and no showing of prejudice is required. *Id.* at 659-60. Here, Johnson specifically states that his trial counsel abandoned him when the prosecutor was

> questioning an official about his 1969 courthouse records, the trial judge stopped the proceedings because he was not happy with the way the prosecuting attorney was performing. He said "find someone who knows how to do this." [Johnson] asked his attorney if the judge could do this? [His

attorney] said "I don't know."

Fed. Writ Pet. at 8. Johnson has not shown how these statements constitute abandonment at a critical stage or that he was constructively denied counsel. Furthermore, Johnson's claim is contradicted by the record, which shows that his counsel objected to his 1969 conviction and argued that the conviction was improperly classified as a felony. 4 R.R. at 29 - 31. Because Johnson is unable to show that counsel's performance was deficient or prejudicial, his ineffective assistance of counsel claims are without merit.

## CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that petitioner's application for writ of habeas corpus be denied with prejudice.

The court further finds that Johnson has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on July 13, 2007.

Stephen Wm Smith
United States Magistrate Judge